66TH CONGRESS, 1st Session } SENATE { DOCUMENT No. 131

# RATIFICATION OF CONSTITUTIONAL AMENDMENTS

## OPINION OF THE

## Supreme Court of the State of Washington

### In the Case of State ex rel. Mullen v. Howell

**As delivered on May 24, 1919**

PRESENTED BY MR. GORE

OCTOBER 13, 1919.—Ordered to be printed

WASHINGTON
GOVERNMENT PRINTING OFFICE
1919

# RATIFICATION OF CONSTITUTIONAL AMENDMENTS.

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STATE EX REL. MULLEN v. HOWELL, SECRETARY OF STATE.

[No. 15313. Supreme Court of Washington. May 24, 1919.]

1. Statutes—Referendum—Construction of constitutional amendment: Constitutional amendment 7, article 2, section 1, providing for a referendum in all cases "except such laws as may be necessary for the immediate preservation of the public peace, health, or safety, support of the State government and its existing public institutions," by specifying the things not reserved, is an expression of a reservation to pass upon all things not so specified.

2. States—Police powers of States—Federal interference: The Federal Government has no power to control the police power of the States, except as such power may have been expressly granted or as it may be necessary to maintain the acknowledged powers of the Federal Government.

3. Constitutional law—Validity of statutes: A law will not be held unconstitutional if it is within the spirit of the policy enunciated by the constitutional provision under consideration.

4. Constutional law—Amendment to United States Constitution—Resolution of legislature—Referendum—"Law": Under the constitutional amendment 7, article 2, section 1, providing for referendum of "acts, bills, or laws," joint resolution of State legislature ratifying constitutional amendment for national prohibition proposed by resolution December 19, 1917 (40 Stat., 1050), is subject to referendum, the amendment to the United States Constitution being a law within the seventh amendment of the State constitution.

[Editor's note: For other definitions, see Words and Phrases, first and second series, Law.]

5. Constitutional law—United States Constitution—Amendment—Method of ratification: The authority to act in the matter of a proposed amendment to the Constitution of the United States does not arise in or out of the constitution of the State, but arises out of the Federal Constitution; and any act, whether by resolution or bill, on the part of the State legislature, is a sufficient expression of the legislative will, unless Congress itself challenges the method or manner of its adoption.

6. Constitutional law—United States Constitution—Amendment—Legislative and judicial powers: In mandamus to compel submission of joint resolution ratifying amendment to United States Constitution, the contention that the legislature has no power to act by resolution is nonjusticiable, the power to question the manner of adoption being in Congress, and not the courts.

7. Constitutional law—United States Constitution—Amendment—Ratification: Congress has no concern of the manner in which the people of the several States pass upon proposed amendments to the United States Constitution.

8. Constitutional law—Amendment to United States Constitution—Referendum—"Legislature": Constitution of United States. Article V, providing that proposed amendment shall be valid "when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof," does not preclude submission of joint resolution of State legislature ratifying proposed amendment to a referendum, the words "legislatures" and "conventions" not having present-day meanings, the former referring to legislative authority, including all its branches, and not merely the legislative assembly.

[Editor's note: For other definitions, see Words and Phrases, first and second series, Legislature.]

9. States—Federal Constitution—Reservation of powers—To States: Constitution of United States, amendment 10, providing that "The powers not delegated to the United States * * * are reserved to the States, respectively, or to the people," is a declaration that the people of the several States may function their legislative power in their own way, especially in view of the ninth amendment.

Parker, Mitchell, Tolman, and Fullerton, JJ., dissenting.

En Banc.

Mandamus by the State of Washington, on the relation of Frank P. Mullen, against I. M. Howell, secretary of state of the State of Washington. Writ ordered to issue.

P. C. Sullivan, of Tacoma; John F. Murphy, of Seattle; and Turner, Nuzum & Nuzum, of Spokane, for appellant.

L. L. Thompson and Glenn J. Fairbrook, both of Olympia, for respondent.

CHADWICK, C. J.: At the general election held in 1912 the people of the State of Washington adopted as a principle of government the power to initiate laws, and to review at the bar of popular opinion all acts, bills, or laws passed by the legislature of the State of Washington.

[1] The right so to do is emphasized as a power reserved, and the terms of the amendment imply in the strongest possible way that the intention of the people was to reserve a right to review every act of the legislature which might affect the people in their civil rights, or limit or extend their political liberties; for they wrote an exception, saying that a referendum may be ordered in all cases "Except such laws as may be necessary for the immediate preservation of the public peace, health, or safety, support of the State government and its existing public institutions." (Amendment 7, art. 2, sec. 1.) The writing of an exception specifying the things not reserved is an expression, within sound rules of construction, of a reservation to pass upon all things not so specified.

The court in passing directly upon the amendment, and in other cases arising under city charters, has held firmly to the principle of the referendum, and has consistently refused to limit it by construction.

In December, 1917, Congress proposed an amendment (Res. Dec. 19, 1917, 40 Stat., 1050) to the Federal Constitution, providing that:

SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation

thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SEC. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

[2] It will be noted that the amendment does not pertain to matters within the original concept of the Constitution, to the definition, or distribution of powers of public officers, but by its terms assumes to cover matters that are purely legislative, and which have hitherto been a subject of legislation by the several States under the police power. We understand that the Federal Government has no power to control the police power of the States except as such power may have been expressly granted, or as it may be necessary to maintain the acknowledged powers of the Federal Government.

This amendment was submitted to and ratified by the Legislature of the State of Washington by joint resolution passed January 13, 1919. On March 20, 1919, relator tendered a petition for a referendum to the respondent secretary of state; he asked that it be filed and a ballot title be supplied. Respondent refused to receive it upon the grounds (*a*) that the amendment having been adopted by a joint resolution, and not by an act, bill, or law, it was not within the terms of the seventh amendment; and (*b*) that it was not a subject for referendum under Article V of the Constitution of the United States.

Addressing ourselves to the first contention of the respondent, Is the resolution an act, bill, or law within the meaning of those terms as employed in our Constitution—whether the people intended an act, bill, or law to be statutes enacted by the legislature, or whether they meant action by the legislature which affected them as law?

[3] No cases have been cited, and we may confidently say that there is none, holding to a rule of strict construction where the power of the whole people is in question. It is a rule, become axiomatic by long-continued reiteration, that no court will hold a law to be unconstitutional unless such holding is compelled; that a law will not be held to be unconstitutional by construction; that is to say, the power of the legislative body, or the people if exercising that function will not be abridged by the courts, or suffered to be abridged by others, if the thing sought to be done is within the spirit of the policy enunciated in the provision under consideration. To this end the courts of the country have so addressed themselves that, without resort to the tedium of limitless authority, we may well adopt the language of Judge Cooley, who was an acknowledged master in the field of constitutional law, that constitutional provisions must be interpreted with reference to—

> the times and circumstances under which the State constitution was formed—the general spirit of the times and the prevailing sentiments among the people. Every constitution has a history of its own which is likely to be more or less peculiar, and unless interpreted in the light of this history, is liable to be made to express purposes which were never within the minds of the people in agreeing to it. (People *v.* Harding, 53 Mich., 48; 19 N. W., 155; 51 Am. Rep., 95.)
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> The safe way is to read its [the Constitution's] language in connection with the known condition of affairs out of which the occasion for its adoption may

have arisen, and then to construe it, if there be therein any doubtful expressions, in a way, so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted. (Maxwell *v.* Dow, 176 U. S., 581, 602; 20 Sup. Ct., 448, 456 (44 L. Ed., 597).)

The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look to the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. (Mugler *v.* Kansas, 123 U. S., 623, 661; 8 Sup Ct., 273, 297 (31 L. Ed., 205).)

The people, too, have directly charged us with a duty to be mindful of their sovereign rights.

A frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government. (Constitution of State of Washington, art. 1, sec. 32.)

Wherefore the purpose of the people in adopting the seventh amendment is a proper subject to be considered. Did they intend to grant any exceptions other than those enumerated in the seventh amendment? If this were an ordinary case of statutory construction, we have no doubt that we could all agree that we would look first to the old law, the mischief, and the remedy. It is more important in considering a question involving, first of all, the sovereign rights of the citizen—the right to speak ultimately and finally in matters of political concern—that we should measure the power reserved by the former condition.

It is well known that the power of the referendum was asserted not because the people had a willful or perverse desire to exercise the legislative function directly, but because they had become impressed with a profound conviction that the legislature had ceased to be responsible to the popular will. They endeavored to, and did—unless we attach ourselves to words, and words alone, reject the idea upon which the referendum is founded, and blind ourselves to the great political movement that culminated in the seventh amendment—make reservation of the power to refer every act of the legislature, with only certain enumerated exceptions.

Guided by these considerations, we are satisfied that the people used the words "act, bill, or law" in no restricted sense, but in a sense commensurate with the political evil they sought to cure.

[4] And why should not the amendment be a law within the meaning of the seventh amendment? No reason is assigned other than that "law" as there used is synonymous with "bill" or "act." We may well argue, and be within sound rules, that if the people had so intended they would not have used the word "law" at all, as was done in the State of Oregon. We can conceive of no more sweeping law than the proposed amendment. Certainly no amendment has ever been proposed that goes deeper into the vitals of the American idea of government. It surrenders pro tanto the sovereignty of the State, gives to the Federal Government a right to enact laws and to enforce them through the Federal courts, and it will deny the citizen the protection of some of those guaranties that we have written out of the travail of time into our own Bill of Rights. Upon construction we hold that the amendment to the Constitution of the United States is a law, within the meaning of the seventh amendment, and is subject to referendum.

But it is contended that, whereas the legislature ratified the amendment by joint resolution instead of by act of bill, as it might have

done, the resolution, being not eo nomine an act, bill, or law, is not subject to a referendum. This argument defeats itself, for if we are to be literal and exact in terminology, and so insistent upon "scholastic interpretation" as to admit this premise, we must hold that the legislature had no power to ratify the amendment except by act or bill; for we find no power granted in the Constitution to that body to act in matters legislative other than by act or bill.

This reasoning would lead to two consequences, equally absurd: Either the amendment being ratified by resolution, the act of ratification is void as a thing done in a manner not provided; or, if sustained, would permit the legislature to defeat the power of referendum by acting, in matters purely legislative, by resolution instead of by bill. The latter is the consequence in the instant case if the argument of the learned Attorney General is to be sustained. But we are not put to the extremity of holding that the legislature may not in matters of ratification act by resolution, for there is a high road of reason leading down to a true result.

The contention that a resolution, although it may have the force and consequence of a formal legislative enactment, and affect the people in their civil and political rights, can not be referred, arises from a misconception of the term. This case sounds in fundamentals, not in definitions. It is not the resolution, but the act of the legislature in adopting it, that is to be referred. A resolution, like all acts of the legislature, is to be measured by the end accomplished. It is true that we have no provision in our Constitution providing for the passage of resolutions even in the formal matters in which the legislature has throughout the entire history of our Territory and State been wont to act, but it is just as evident that there is no limitation upon the power of the legislature to act by resolution.

The constitutions of some of the States and the Constitution of the United States (sec. 7, Art. I) permit or recognize the practice of acting by resolution, and some of them limit its uses. It has been held if the Constitution is silent, as ours is, that legislation can not be effected by that method. (Boyers *v.* Crane, 1 W. Va., 176; State ex rel. Attorney General *v.* Kinney, 56 Ohio St., 721, 47 N. E., 569; Barry *v.* Viall, 12 R. I., 18.)

[5] And were we considering a matter involving private right, arising in or out of the laws of this State, we could not question the authorities just cited; but they are not applicable for the reason that the authority to act in the matter of a proposed amendment to the Constitution of the United States does not arise in or out of the constitution of the State, but arises out of the Federal Constition, and any act, whether it be by resolution or by bill, on the part of the State legislature must be held to be a sufficient expression of the legislative will, unless Congress itself challenges the method or manner of its adoption. It is upon this principle that the Supreme Court of the United States has held that the question whether the referendum does violence to the Constitution of the United States is nonjusticiable, holding that the question whether it deprives the government of a State of its representative character, thus violating the guaranty of a republican form of government, is a question for Congress and not for the courts.

[6] The power to question the manner of adoption being in Congress, and not in the courts, the contention that the legislature has

no power to act by resolution in nonjusticiable, but this holding does not foreclose an inquiry as to the legislative character of the thing done.

It may be that my argument is not entirely clear. If so, we may profitably resort to an illustration. The people of the State of Washington have, by expression of their reserved right to legislate upon all proper subjects of legislation, declared the policy of this State to be against the barter and sale of intoxicating liquor within the State, and by subsequent laws that we, as citizens of a sovereign State, are opposed to the use of intoxicating liquor by any of our citizens. The original law, by its accretions, has become what is popularly called, in the nomenclature of the Anti-Saloon League, "bone dry." This the people did of their own free will and accord and by the assertion of a hitherto unused power. Let the question occur, Can their act be undone by any plan, power, or authority less or other than the power that established the present state of the law? Keeping in mind our present "bone-dry" condition, or plight, if that term be preferred, suppose the Congress of the United States should propose an amendment to the Federal Constitution providing that it shall hereafter be lawful to ship and sell in all of the States of the Union wines and beers containing not to exceed a certain minimum of alcohol—that it has the power so to do will not be denied; then suppose that the State legislature did by resolution, as in the present instance, ratify the amendment, and that it was ratified by a sufficient number of States only, including our own, to meet the demands of the Federal Constitution. We would then have a law that was not a law before; that would wipe out pro tanto the present law; that would work such an exception to it that, so far as the policy of our citizens had been expressed by their direct vote, would defeat its purposes. In such event—and it is a reasonable postulate—would it be urged for one moment that the people of this State could be denied a right of referendum to determine for themselves, under their reserved powers, whether they desired their own law to be thus overcome? Would they have to stand by helplessly while the fruits of their victory were swept away and their sovereignty surrendered in degree by resolution of the legislature?

I opine that we would find some way to declare that the right to refer the matter to the people, who had theretofore exercised their reserved power upon the very subject of the proposed legislation, could not be thus defeated. It is no argument to say that a referendum in that event would operate to promote a good cause, while this demand comes from those who would defeat all liquor legislation. We are here to declare the law, not to maintain or defend policies; and it is enough to say that the relator is within the law as declared by the whole people, and as such his right should not in conscience be denied. We can not fit a rule to meet a particular case; it must apply to all alike, whatever the cause and whatever the character of those who invoke it.

The final and, as we believe, the principal ground of opposition is that the amendment, being submitted under Article V of the Constitution of the United States, is a Federal question in the sense that State laws and State constitutions have no bearing upon or relation to the issues.

It is argued that inasmuch as Article V of the Constitution of the United States provides that a proposed amendment "shall be valid, to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several States or by conventions in three-fourths thereof," etc., the people have hitherto fixed the manner and form of ratification, against which the reserved power of the people of a sovereign State may not prevail. If we are to stand upon the word "legislatures"; if that word, and that alone, is the Alpha and Omega of our inquiry, it follows that the controversy is at an end; but we are cited to no instances where a great question involving the political rights of a people has been met by such technical recourse; where any court has so exalted the letter or so debased the spirit of the law.

In Noble State Bank *v.* Haskell (219 U. S., 104, 31 Sup. Ct., 186, 55 L. Ed., 112, 32 L. R. A. (N. S.), 1062, Ann. Cas., 1912A, 487) Justice Holmes frowned upon a like invitation, saying:

> We must be cautious about pressing the broad words of the fourteenth amendment to a dryly logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. * * * Judges should be slow to read into the latter [the Constitution of the United States] a nolumus mutare as against the lawmaking power.

[7] It may be set down as a truism that the Congress of the United States has no concern of the manner in which the people of the several States pass upon the proposed amendments. It is the act of ratification or rejection by the legislative power in a State, and not the manner of doing, that makes for the result to be accomplished.

It may be true that it might have been provided that amendments could be made directly by Congress, and the submission of amendments for ratification or rejection by the legislatures of the several States at all was a matter of grace upon the part of the whole people when the Constitution was adopted; but we would incline to the opinion that the right to pass upon proposed amendments should be treated as a reservation in the several States of the right to express their legislative will in the manner in which they had then provided, or might thereafter provide, and, when so regarded, as a compact between the States and the Federal Government.

It is provided in the Federal Constitution that proposed amendments shall be ratified by the legislatures of the States or by conventions assembled for the purpose of considering them. It can not be urged successfully that the framers of the Constitution used the words "legislatures" and "conventions" as terms describing then present institutions, for it is well known that at the time the Constitution was adopted some of the States did not have legislative assemblies.

Article 5 can mean no more than this: That no amendment shall be adopted unless it is sanctioned by the supreme legislative power of a sufficient number of the Commonwealths, whether such ratification be by legislative assembly, conventions, or such other method as might thereafter be adopted by the people in the several States.

[8] If we hold that the words "legislatures" and "conventions" do not control the plain purpose and spirit of Article V—that is, that the people shall pass upon a proposed amendment by their representatives, if that be the plan provided by them at the time

of its submission, or, if not, under such other plan of expressing their will as may not be offensive to the Federal Constitution—we are on solid ground. For the framers of the Constitution had well in mind—for they had lived in that time when our political system was being fashioned into concrete form—they understood, as we sometimes forget, that "the theory of our political system is that the ultimate sovereignty is in the people, from whom springs all legitimate authority." (Cooley, Constitutional Limitations, 6th ed., p. 39.) Wherefore it may be said that it is the meaning and intent of Article V that an amendment to the Constitution of the United States shall not become effective until it has been ratified by the legislative authority of a sufficient number of the States, and it should not be held that a ratification or rejection by a popular vote, under the referendum clause of a State constitution, would be contrary to the provisions of Article V unless it can be said, under sound rules of construction, that the referendum is offensive to the Constitution of the United States.

The people of several of the States, having the sovereign right of self-government, excepting only as they may have yielded that right under the Constitution of the United States and its amendments, have adopted the referendum as a rule of government, and the only objection that has ever been urged, or that could have been urged, against it, is that it violates section 4, Article IV, of the Constitution, guaranteeing to every State a republican form of government. The Supreme Court of the United States has held that it does not so offend. (Pacific States Telephone & Telegraph Co. *v.* Oregon, 223, U. S., 118; 32 Sup. Ct., 224; 56 L. Ed. 377.)

The fault of disassociating a word or correlative words from the text of a written law, and promising a judgment without the warmth of the spirit of that law, may be illustrated. If we are wrong, it may well be that a State might, and withal unwittingly, put it beyond its power to pass upon a proposed amendment to the Federal Constitution. If the people of this State, had, when they adopted the referendum, provided for the abolition of our legislative assembly—as they might have done—and had provided that all laws should thereafter be initiated by, and voted upon by, direct vote of the people, or that the legislative functions of the States should be exercised by a council of three, and that all their acts should be subject to a referendum at the next succeeding general election, it would follow, under the theory advanced to defeat a referendum in this case, that a proposed amendment could not be either ratified or rejected in the State of Washington, for there would be no "legislature" or "convention" in the sense in which those terms are employed in the Federal Constitution.

Significance is placed on the word "conventions," it being contended that if the word "legislature" had been used alone our argument might seem plausible, but the added word "conventions" necessarily implies that Congress had in mind a representative body and not legislative authority, but we are inclined to take a broader view.

It was doubtless intended that "legislatures" should mean one thing—that is, the legislative authority of the State—and "conventions" another thing—an extraordinary representative body, convened by and in the State, for the sole purpose of passing upon the

proposed amendment to the Federal Constitution. If it had no other intention in adopting the term "legislatures" in specifying one of the instrumentalities for passing upon the proposed amendment than to express the idea of legislative power, of whatever that power consists, then it must be deemed to mean all the branches or component parts of that power, which have included the qualified voters also, if they so desire. Inasmuch as the Constitution was formulated not for a day or a year, but for all time except as amended, we may consider that it contemplated the same kinds of State legislative bodies then in existence and known to the farmers, or any other kinds of legislative bodies that should come into existence in the future.

One of the important ideas governing the framers of the National Constitution was that amendments to that instrument should be ratified by the States as units, recognizing and preserving the integrity and sovereignty of the States as parties to the compact creating and continuing that Constitution. Doubtless there was no other idea prevailing in providing for adoption of amendments by the "legislatures" or "conventions" of three-fourths of the States than that. Certainly it was and is of no concern to the others what sort of legislature any particular State has, so long as it conforms to the scheme of a republican form of government.

We have preferred to meet the question upon the plane of broad reason, having in mind the spirit and policy of the referendum; but we are not without competent authority to prove that the manner or the name attached to the legislative power of the State, whether it be a representative body or the people themselves, is of no concern to the Federal Government.

In State ex rel. Schrader *v.* Polley (26 S. D., 5, 127 N. W., 848) it was contended, inasmuch as it was provided in the Federal Constitution (sec. 4, Art. I) that "the times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof, * * *" that the relator was entitled to have his name go upon the ballot at a general election under an act of the legislature, but against which a referendum petition had been filed. And it would seem, if the argument of the respondent is sound, that the prayer of the relator in that case should have been granted, for there the Constitution of the United States provided that the legislature should prescribe the times, places, and manner of holding elections, while in the instant case the provision is that the amendment shall be ratified by the legislatures.

[9] After noting the tenth amendment to the Constitution, that "the powers not delegated to the United States * * * are reserved to the States, respectively, or to the people," which, by the way, is a declaration that the people of the several States may function their legislative power in their own way, especially so when the ninth amendment, "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people," is regarded—for the right to legislate directly or by representative bodies is a right assuredly retained, and, being retained, may be exercised in the form and manner provided by the people of a State—the court says:

> We are also of the opinion that the word "legislature," as used in section 4, article 1, of the Federal Constitution, does not mean simply the members who compose the legislature, acting in some ministerial capacity, but refers

to and means the lawmaking body or power of the State, as established by the State constitution, and which includes the whole constitutional lawmaking machinery of the State. State governments are divided into executive, legislative, and judicial departments, and the Federal Constitution refers to the "legislature" in the sense of its being the legislative department of the State, whether it is denominated a legislature, general assembly, or by some other name. Under section 1, article 3, of the State constitution, it will be observed, the people of this State have reserved to themselves, as a part of the lawmaking power, the right to vote by referendum upon any law passed by the legislature, with certain specified exceptions, prior to the going into effect of such law. That the exceptions mentioned are "such laws as may be necessary for the immediate preservation of the public peace, health, or safety, support of the State government or its existing State institutions." It is clear that said chapter 223 is not within any of these exceptions. Under the constitution of this State the people, by means of the initiative and referendum, are a part and parcel of the lawmaking power of this State, and the legislature is only empowered to act, in accordance with the will of the people as expressed by the vote, when the referendum is properly put in operation. The term "legislature" has a restricted meaning, which only applies to the membership thereof, and it also has a general meaning which applies to that body of persons within a State clothed with authority to make the laws (Bouvier's Law Dic.; Webster's Dic.; 18 Am. & Eng. Ency., 822; 25 Cyc., 182), and which, in this State, under section 1, article 3, Const. S. D., includes the people. * * *

In Baldwin *v.* Trowbridge (2 Bart. Contested El. Cas. 46) the majority report, in presenting the legal side of the controversy, shows the following pertinent language, which meets with our approval: "But it was argued that this power was by express terms left, not to the States simply, but to the legislatures thereof, and that this is such a limitation upon the people of the States that they have now power to restrict their legislatures in the exercise of this right, conferred upon them by the Federal Constitution; but I submit, with all due respect, that not only the history and object of the section under consideration, but the proper definition of the term "legislature," as therein used, show the fallacy of this construction. The "legislature" of the State, in its fullest and broadest sense, signifies that body in which all the legislative power of a State resides, and that body is the people themselves, who exercise the elective franchise, and upon their power of legislation there is no limitation or restriction, except such as may be found in the Federal Constitution, or such as they themselves may provide by the organic law of the State.

The writ was denied.

State ex rel. Davis *v.* Hildebrant (94 Ohio St., 154; 114 N. E., 55), is likewise to the point. The general assembly, being the representative legislative body of the State of Ohio, passed an act on May 27, 1915 (105–106 Ohio Laws, p. 474), redistricting and apportioning the State into several congressional districts. The State had theretofore by an act passed April 28, 1913 (103 Ohio Laws, p. 568), been districted and divided. A sufficient number of the people filed a petition for a referendum of the later act. It was submitted to the electors of the State, and was rejected by a majority of the voters. It was contended that the act of 1915 was a valid act, and was not a subject of referendum, because section 4, Article I of the Federal Constitution, provided that the times, places, and manner of holding elections for Members of Congress "shall be prescribed in each State by the legislature thereof." The court put the question:

> Does the term "legislature," as used in Article I, section 4, of the Federal Constitution, comprehend simply the representative agencies of the State, composed of the members of the bicameral body, or does it comprehend the various agencies in which is lodged the legislative power to make, amend, and repeal the laws of the State, including the power reserved to the people, empowering them to "adopt or reject any law" passed by the general assembly under the provisions of section 1, article 2, of the constitution of Ohio?

After reference to the State constitution, which is in form similar to the seventh amendment to our own, the court says:

These various sections disclose that, while the legislative power has been delegated to the bicameral body, composed of the senate and house of representatives, the people of Ohio have, by the aforesaid provisions of their constitution, determined the manner by which such legislative power may be exercised, under what circumstances the laws passed by it may become operative without an appeal to the people, and have further imposed the conditions under which such laws may become operative or inoperative as they may have been adopted or rejected by the popular vote designated as the "referendum."

While Article I, section 4, of the United States Constitution, is controlling upon the States, in so far as it grants the legislature of the State authority to prescribe the times, places, and manner of holding elections, this is the quantum of the Federal grant. The character of the legislature, its composition, and its potency as a legislative body are among the powers which are, by Article X of said Constitution, "expressly reserved to the States, respectively, or to the people."

Webster's New International Dictionary defines "legislature" as follows: "The body of persons in a State, or politically organized body of people, invested with power to make, alter, and repeal laws."

The Century Dictionary defines the same term as follows: "Any body of persons authorized to make laws or rules for the community represented by them."

Under the reserved power committed to the people of the States by the Federal Constitution, the people, by their State organic law, unhindered by Federal check or requirement, may create any agency as its lawmaking body, or impose on such agency any checks or conditions under which a law may be enacted and become operative. Acting under this recognized authority, the Ohio constitution, prior to the adoption of the amendment of 1912, provided that the "legislative power" of the State should be vested in the general assembly, consisting of a senate and house of representatives. The same provision now exists, but by the adoption of the amendment of 1912 the people expressly limited this legislative power by reserving to themselves the power to reject any law by means of a popular referendum. The lawmaking body, the legislature, as defined by the lexicographers, comprehends every agency required for the creation of effective laws. It can not be claimed that the term "legislature" necessarily implies a bicameral body. When the term was originally embraced in the Constitution the Legislatures of Pennsylvania, Georgia, and Vermont consisted of but a single house, with a second body in each called an executive council. These States later abolished their councils and established a legislature consisting of two branches, and such is the character generally of the various State legislatures to-day. (1 Bryce's American Commonwealth, p. 461, note.)

The constitutional provision relating to the election of Congressmen, conferring the power therein defined upon the various State legislatures, should be construed as conferring it upon such bodies as may from time to time assume to exercise legislative power, whether that power is lodged in a single or two-chambered body, or whether the functions of the latter be curbed by a popular vote or its enactments approved by a referendum vote.

This case went to the Supreme Court of the United States. (State ex rel. Davis *v.* Hildebrant, 241 U. S., 565, 36 Sup. Ct., 708, 60 L. Ed., 1172.) That court passed the question of the power of the State to adopt and use the referendum as an instrument of legislative will "as obvious," holding that the State law, which had been made subject to the referendum, was valid and operative. A conclusion manifestly unsound if the word "legislature" means a bicameral body, and that meaning is inflexible under the Constitution of the United States; for, if that were so, the States would have no power to prevail against it whatever the form of their expression may have been.

But it is said that the Supreme Court may be unsound in that respect, but is sound in result, because the Congress had passed an

act (act Aug. 8, 1911, c. 5, 37 Stat., 13) making the referendum a component part of the legislative authority empowered to deal with the election of Members of Congress. There is nothing in the act of Congress which "prevents the people of a State from reserving a right of approval or disapproval by referendum of a State act redistricting the State for the purpose of congressional elections" (syllabus). But, if it were so, it would not avail respondent, for the power of the State to act comes from the Constitution and not from any act of Congress. To give such effect to an act of Congress would be to say that Congress might by act amend the Constitution. Chief Justice White disposed of the controversy when he defined the issue:

> The right to this belief was based upon the charge that the referendum vote was not and could not be a part of the legislative authority of the State, and therefore could have no influence on the subject of the law creating congressional districts for the purpose of representation in Congress—

And said—

> The court below adversely disposed of these contentions, and held that the provision as to referendum was a part of the legislative power of the State. * * * As to the State power, we pass from its consideration, since it is obvious that the decision below is conclusive on that subject, and makes it clear that, so far as the State had the power to do it, the referendum constituted a part of the State constitution and laws, and was contained within the legislative power, and therefore the claim that the law, which was disapproved and was no law under the constitution and laws of the State, was yet valid and operative, is conclusively established to be wanting in merit.

It could not have been so held if the act of the legislature, as distinguished from legislative authority, was essential under section 4. If that were so, the court must have denounced the referendum in that and all cases where the Constitution leaves a matter to the "legislature," and refused to follow the State court, for its first duty is to the Constitution.

Our attention is called to an unpublished decision of the Supreme Court of Oregon in Hebring *v.* Attorney General (180 Pac., 328). The premise of the decision is that the reserved power of the people is limited to a review of "any act of the legislative assembly," and that the word "act" was used having in mind the exercise of the legislative function as outlined in the original draft of the State constitution, and that the word "act" did not comprehend a joint resolution.

We have already demonstrated that our Constitution is more comprehensive. The decision does not appeal to us for another reason. Its basis is fundamentally unsound, in that it proceeds upon the theory that the right of the people to legislate upon the question rests in the antecedent provisions of the State constitution, whereas the right comes from the Constitution of the United States.

Other questions were discussed by counsel. We have considered them, and are agreed that they are not controlling.

The writ will issue.

Mount, Main, and Holcomb, JJ., concur.

Mackintosh, J. (concurring): By the adoption of the initiative and referendum amendment the people of this State became a part of the legislative branch of the State government, and all legislative actions, except those especially exempted, are subject to their par-

ticipation. The reasons which have led up to this modern form of legislation are as set forth in Judge Chadwick's opinion, and, upon both authority and reason, no curtailment of this power should now be judicially sanctioned. If the people have declared their intention to assert their authority over the legislature in acts many of which are of temporary or small importance, it was surely their intention to preserve to themselves the right of reviewing legislative action of lasting and great importance, and within this category assuredly fall all actions dealing with the amendment of the Federal Constitution. It would be idle to say that the right of referendum could be exercised in the unimportant matters and not in the important.

The dissenting opinion of Judge Parker indulges in altogether too narrow and restricted an interpretation of the right of referendum, and seems to be entirely out of harmony with the course of the decisions of this court upon this and kindred matters arising under laws affecting modern legislative and governmental functions. By strict adherence to dictionary definitions this dissenting opinion crushes the spirit of the constitutional provisions under consideration, and, if it were the prevailing view in this case, would mark a step backward by a court which has come to be recognized as rather liberal in its interpretation of legislation aimed at the correction of social and public evils. It is clear to my mind that the law contemplated the submission to the people of all legislative acts, using that word in its broad signification, and it is also clear that the Constitution of the United States, in providing for amendments thereof, intended that those amendments should by Congress be submitted to the legislative powers of the various States, and that the term "legislature," as used in that broad way, was not meant to refer merely to what is commonly called a legislature.

The view expressed by Judge Fullerton appears to me to be equally as untenable as those written by Judge Parker and those agreeing with him. As I understand it, that view is that because the legislature ratified the proposed constitutional amendment by joint resolution instead of by an act, that therefore there has never been any ratification by the State of Washington of the proposed prohibition amendment. The answer to this has been admirably expressed in the majority opinion, and it would appear to be self-evident that the technical manner of signifying the agreement of the legislative body is a question which should be determined by the Congress of the United States and is not a matter of our concern.

I am compelled by the majority opinion to concur in the result therein arrived at.

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